



**STATE OF CALIFORNIA
COMMISSION ON JUDICIAL PERFORMANCE
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**REPORT CONCERNING ADOPTION OF ADDITIONS AND AMENDMENTS TO
RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE
July 8, 2019**

Pursuant to its rulemaking authority under article VI, section 18, subdivision (i) of the California Constitution and section 3.5 of the Policy Declarations of the Commission on Judicial Performance, on March 15, 2019, the Commission on Judicial Performance circulated for public comment a set of proposals for additions and changes to some of its rules. At its meeting on June 26, 2019, after having considered the comments received, the commission adopted the proposed rule amendments, with some modifications. The text of each addition and amendment is attached, and the final version of the amended rules may be found on the commission's website at <http://cjp.ca.gov>.

This report also discusses rule proposals that were received during the comment period that were not circulated for public comment, with the commission's explanation for not pursuing those proposals.

**I. EXPLANATION OF RULE AMENDMENTS AND DISCUSSION OF
PUBLIC COMMENTS**

**A. Amendments to Rules 113 and 115 Concerning Notices of
Intended Private and Public Admonishment**

Explanation of Amendments

In both rules, the amendments replace the word "intended" with "tentative" and delete the phrase "found by the commission" to reflect that the proposed private or public admonishment set forth in the notice to the judge is tentative (i.e., not final) until the judge either accepts the admonishment or contests it by demanding an appearance before the commission or demanding formal

proceedings. The term “tentative” was chosen because it is often used in the civil or family law context to refer to judicial decisions that are not yet final and are subject to possible further action by a party, such as a request for a hearing.

Discussion of Comments

The California Judges Association (CJA) and the Alliance of California Judges (the Alliance) support the amendment. No comments opposing the amendment were received.

B. Amendments to Rules 122 and 126 for New Discovery Procedure for Subpoenas for Production of Documents

Explanation of Amendments

The amendment of commission rule 122, entitled “Discovery Procedures,” to add a new subdivision (h), entitled “Subpoenas for the production of documents,” provides a new procedure that permits parties to obtain documents from nonparties via subpoena, while providing appropriate protections for those who may be subject to the subpoenas. The new procedure includes the filing of an application with a good cause requirement, an opportunity to object, and a notice of privacy rights requirement when a subpoena seeks personal or employment records.

Rule 126 now includes a reference to the new procedure for subpoenas for the production of documents, as distinct from subpoenas to nonparties to attend hearings in formal proceedings.

Discussion of Comments

CJA and the Los Angeles Superior Court (LASC) support the proposed new rule. They have offered certain suggestions and clarifications, some of which are included in the final text of the new rule. They suggest, however, that applications for subpoenas should be heard by the special masters once they have been appointed, and that additional deadlines for action on applications, objections, and the issuance of subpoenas should be included.

In addition, LASC proposes that (1) parties should be allowed to seek more than four subpoenas upon a showing of good cause for the need for additional subpoenas, (2) matters decided by the commission before the special masters are appointed can be appealed to the masters, (3) the first four subpoenas may be served without a stipulation, and (4) the provisions of Code of Civil Procedure section 2025.220 should be incorporated into the procedure.

The commission declined to adopt the suggestion that applications for subpoenas be heard by the special masters after they have been appointed. New subdivision (h) of rule 122 regarding subpoenas for the production of documents was designed to parallel existing subdivision (g) of rule 122, which governs the issuance of subpoenas for depositions after formal proceedings have been initiated. Subdivision (g) states that requests for deposition subpoenas are to be made to the commission, not the special masters.¹ Motions under that section are to be presented to the commission, which may designate the chairperson or the chairperson's designee to perform its duties. The chairperson has the option of designating the special masters if they have been appointed. CJA argues that the special masters are best suited to make the determination because they are "immersed in the details of the matter." There may, however, be circumstances when the special masters might not have enough information to determine whether the issuance of a subpoena for the production of documents is appropriate. For example, if the special masters were appointed shortly before the subpoena request, they might have no background as to the history of a particular matter, which could have some bearing on whether the subpoena should be issued. Furthermore, having the commission determine whether a subpoena should issue, or whether the matter should be delegated to the special masters, ensures that the process is handled by a group that is comprised primarily of public members as opposed to a group that is comprised only of judges.

The commission also declined to adopt the suggestion that deadlines for certain actions by the commission or its designee be imposed. The commission has consistently acted expeditiously in connection with subpoena applications and objections, typically within two or three business days. There is no reason to impose deadlines, particularly because, in the unlikely event a matter could not be ruled upon within a specified time limit, there is no reasonable remedy for missing the deadline. It would not be appropriate to have an application or objection granted automatically, without regard for the merits, just because it could not be acted upon within a particular timeframe.

Regarding LASC's additional suggestions, the commission determined to adopt one of them, but not the others, as follows.

(1) The commission determined to add the following clarification to the rule: "The parties may seek more than four subpoenas only upon a showing of good cause for the issuance of the additional subpoena(s)."

¹ Special masters can only decide whether a deposition to perpetuate testimony may be taken.

(2) LASC misunderstands the rule to require that the parties stipulate to the first four subpoenas. The rule does not require stipulations; it simply permits the parties to stipulate as an alternative to having to show good cause.

(3) Code of Civil Procedure section 2025.220 pertains to depositions, not subpoenas for the production of documents, and it does not add anything meaningful to the proposed rule.

Additional Clarifications

The commission determined to add language (1) confirming the existing practice that documents produced in response to a subpoena shall be made available to the opposing party, (2) spelling out what should be included in the notice of privacy rights,² and (3) clarifying that motions under new subdivision (h) shall be presented to the chairperson of the commission, and not the commission itself. The commission's practice has been to delegate to the chairperson, for the sake of efficiency, the decision about who should decide motions presented to the commission under that subdivision. The revised language simplifies this process.

C. Amendment of Rule 128 to Clarify Whether the Commission or the Special Masters Should Consider a Motion to Amend a Notice of Formal Proceedings

Amended rule 128 now gives clear direction about whether a motion to amend the notice should be decided by the commission or by the special masters. The commission will decide a motion to amend that is made prior to the commencement of the evidentiary hearing. If the motion is made to conform to proof based on facts presented through evidence at the evidentiary hearing before the special masters, then the special masters will rule on the motion. But if a motion to amend is based on information obtained other than through evidence presented at the hearing before the special masters, the judge will be given an opportunity to respond, and the chairperson will decide whether the commission or the special masters should determine the motion.

² "The notice of privacy rights shall state that the documents sought may be protected by a right to privacy; that any objection to the subpoena may be filed with the commission, with copies sent to the examiner and the respondent, within seven days of receipt of the notice; and that, if the party seeking the documents will not agree to cancel or limit the subpoena, an attorney should be consulted about the recipient's privacy rights."

Comment from CJA

CJA supports the amendment, but suggests the special masters should hear any motion made during formal proceedings, rather than the chairperson or chairperson's designee, because the special masters are in the best position to do so during the hearing. CJA says that it is difficult to imagine circumstances that would allow amendment during formal proceedings that is not based on evidence presented at the hearing without violating the judge's due process rights.

CJA's assertion that an amendment that is not based on evidence presented at the hearing could not occur without violating the judge's due process is addressed by the provision in the rule that a judge "shall be given reasonable time both to answer the amendment and to prepare and present his or her defense against the matters charged thereby," which affords the judge due process.

II. DISCUSSION OF RULE PROPOSALS NOT CIRCULATED FOR PUBLIC COMMENT OR ADOPTED

A. Rule Proposals Submitted by California Judges Association

On May 13, 2019, CJA submitted proposed new rules for consideration during the comment period, and not during the period for proposing new rules. The period for proposing new rules was from September 24, 2018 to October 22, 2018. The commission determined not to circulate CJA's proposals because they were untimely, as well as for the reasons discussed below.

1. Proposed Amendment to Rule 129(d), Report of Special Masters

When the commission institutes formal proceedings and requests the appointment of special masters pursuant to rule 121, the California Supreme Court appoints three judges as special masters to preside over a public evidentiary hearing and to submit a report to the commission with findings of fact and conclusions of law, along with an analysis of the evidence and reasons for their findings and conclusions. (Rule 129(d).) CJA has proposed adding to rule 129(d), "The commission shall be bound by the findings of fact [of the special masters] in determining the imposition of discipline."

In 2016, CJA proposed a similar addition to rule 129(d), which was, "The commission shall be bound by the findings of fact and conclusions of law of the masters in determining the imposition of discipline." This year, CJA has

eliminated “and conclusions of law” from its proposal. It also suggests including one public member on the panel of special masters, but only if its proposed rule is adopted. CJA says that the commission should consider its proposal in light of the April 2019 Audit Report, which recommended that the Legislature propose and submit to voters an amendment to the California Constitution establishing a bicameral structure for the commission that includes an investigative body and a disciplinary body, with a majority of public members in each body. It is the commission’s understanding that the Legislature is considering that recommendation, and that the proposed change to the commission’s structure requires a constitutional amendment.

The commission determined not to adopt CJA’s 2016 proposal, and determined not to adopt the current proposal, because it would inappropriately delegate the commission’s current constitutional authority and mandate to judges who are appointed as special masters. The California Constitution vests with the commission the authority to investigate complaints of judicial misconduct, to determine whether a judge has engaged in misconduct, and to impose discipline. (Cal. Const., art. VI, § 18.) In 1994, by approval of Proposition 190, the voters of California changed the composition of the commission from a majority of judge members to a majority of public members.

Even before the passage of Proposition 190, when the commission only made recommendations to the Supreme Court on factual findings, legal conclusions, and discipline (see Cal. Const., art. VI, § 18, former subd. (c)), the Supreme Court held that because “[t]he Commission, not the masters, is vested by the Constitution with the ultimate power to recommend to this court the censure, removal or retirement of a judge[.]” the commission is “free to disregard the report of the masters and may prepare its own findings of fact and consequent conclusions of law.” (*Geiler v. Commission on Judicial Performance* (1973) 10 Cal.3d 270, 275.)

Although CJA is only seeking to have the commission bound by the special masters’ findings of fact in its current proposal, because the voters of California have entrusted the commission with the ultimate authority to make determinations of judicial misconduct and discipline, subject to discretionary Supreme Court review, and have changed the composition of the commission to a majority of public members, the commission should independently review the record and make its own findings of fact, in addition to its own conclusions of law.

2. Proposed New Rule for Providing Discovery to Judge Prior to Formal Proceedings

CJA proposed a new rule that would require the commission to provide discovery, including complaints and all witness statements, to judges during a preliminary investigation. The commission currently provides discovery to judges only after the initiation of formal proceedings. (Rule 122.) Information that is subject to discovery is currently considered confidential until formal proceedings are initiated.

In 2012, CJA proposed a similar rule. In response, the commission amended rules 110 and 111 to incorporate the commission's long-standing practice of informing judges of the specifics of the allegation(s) in staff inquiry and preliminary investigation letters and offering judges an opportunity to respond, as stated in policy declarations 1.3 and 1.5. The commission determined, however, not to adopt the rule proposed by CJA because eliminating the confidentiality of complainants and witnesses would severely compromise its investigation of complaints of judicial misconduct and would jeopardize protection of the public. The commission's practice, as reflected in the 2013 amendments to rules 110 and 111, is consistent with the majority of state judicial disciplinary commissions in the country. Only one state – Alabama – requires the discovery requested by CJA *before* a formal charge is filed in judicial disciplinary proceedings. When Alabama amended its rules in 2001 to require disclosure of the identity of complainants, among other things, complaints dropped almost by half.³ An American Bar Association (ABA) report concluded that Alabama's procedures "conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the commission to effectively conduct a proper investigation."⁴

CJA made a similar proposal again in 2016. The commission determined not to adopt it because it would compromise the commission's investigation of complaints and deter the filing of valid complaints. In the commission's view, current rules provide the judge with fair notice of the allegations while protecting the confidentiality of complainants and witnesses, thereby ensuring that the commission complies with its mandate to efficiently and effectively investigate complaints of judicial misconduct and to protect the public.

³ ABA report at page 14.

⁴ ABA report at page 17. In addition to the discovery provisions discussed in this report, Alabama's amended rules require verification of complaints.

Staff inquiry and preliminary investigation letters sent to the judge describe the alleged conduct with as much detail as possible without disclosing the identity of the complainant or witnesses. The judge is informed of the date and location of the alleged conduct, and the name of the court case if applicable, when this information is known to the commission. If the investigation concerns statements made by or to the judge, the letter to the judge includes the text or summaries of the comments, and, if a transcript is available to the commission, pertinent quotes and citations to the transcript are included. This degree of specificity provides the judge with adequate notice to be able to effectively respond to the allegations. Further, the California Supreme Court has upheld the commission's confidentiality protections and discovery rules, finding that they satisfy due process requirements.⁵

B. Proposed Amendment by the Alliance

The Alliance suggested, as part of its comments, without proposing a particular rule, that the commission amend its own rules to create a two-body structure. This suggestion was based on a recommendation made by the State Auditor to the California Legislature that was contained in the April 2019 Audit Report. Because the Audit Report states that a constitutional amendment is required to implement the recommended restructuring of the commission, the commission determined that it is not appropriate to amend its rules to do so.

⁵ *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 526-529.

TEXT OF AMENDED RULES

Language deleted from the current rules is printed in ~~strikeout type~~ and new language is printed in *italic type*.

AMENDMENTS TO RULE 113

Rule 113. Notice of ~~Intended~~ *Tentative* Private Admonishment

If after a preliminary investigation the commission determines that there is good cause for a private admonishment, the commission may issue a notice of ~~intended~~ *tentative* private admonishment to the judge by certified mail. The notice shall include a statement of facts ~~found by the commission~~ and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 114. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

AMENDMENTS TO RULE 115

Rule 115. Notice of ~~Intended~~ *Tentative* Public Admonishment

If the commission determines following a preliminary investigation that there is good cause for public discipline, the commission may issue a notice of ~~intended~~ *tentative* public admonishment to the judge by certified mail. The notice shall include a statement of facts ~~found by the commission~~ and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 116. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

AMENDMENTS TO RULE 122

Rule 122. Discovery Procedures

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(h) (Subpoenas for the production of documents) *After the filing of the notice of formal proceedings, subpoenas for the production of documents by nonparties shall be allowed as provided in this subdivision. The party requesting the subpoena shall bear all costs for service of process of the subpoena on a nonparty.*

(1) *The parties shall have the right to the issuance of up to four subpoenas for the production of documents to nonparties, subject to the requirements of this rule. The parties may seek more than four subpoenas only upon a showing of good cause for the issuance of the additional subpoena(s). Subpoenas issued to commission members or staff under this rule are not permitted. Commission files and records are not subject to a subpoena for production of documents.*

(2) *If the examiner and judge stipulate in writing that a subpoena for the production of documents may issue, the commission shall issue the subpoena. If the examiner and judge are unable to agree to the issuance of a particular subpoena, the party seeking the subpoena may file an application for the issuance of that subpoena with the commission. The application shall be made on a form provided by the commission and shall include a declaration from the party or the party's attorney establishing good cause and including (a) an itemization, with reasonable particularity, of each document requested, (b) facts establishing why each document is relevant to the issues raised in the formal proceeding, and (c) facts establishing that the witness has the documents requested in the witness's custody or control. A copy of the proposed subpoena shall be attached to the application. The application must be served on the other party. Upon a finding of good*

cause based on the foregoing factors, the chairperson of the commission, the chairperson's designee, or the special masters may issue the subpoena.

Objections to an application for a subpoena for the production of documents shall be filed within seven days of the filing of the application. The commission or the special masters may place restrictions or conditions on the manner, time, and place of the document production.

(3) *Applications for subpoenas for the production of documents shall be made in sufficient time for service of the subpoena and the production of documents to be completed 30 days prior to the hearing, unless a later cut-off time otherwise is set by the commission or by stipulation of the examiner and the judge.*

(4) *If an application for a subpoena seeks documents that are personal records as defined by Code of Civil Procedure section 1985.3, or employment records as defined by Code of Civil Procedure section 1985.6, the application shall include a "notice of privacy rights" advising the individual whose records are sought of the subpoena and of the individual's right to object within seven days of receipt of the notice. The notice of privacy rights shall state that the documents sought may be protected by a right to privacy; that any objection to the subpoena may be filed with the commission, with copies sent to the examiner and the respondent, within seven days of receipt of the notice; and that if the party seeking the documents will not agree to cancel or limit the subpoena, an attorney should be consulted about the recipient's privacy rights. If the subpoena is issued, the subpoena, accompanied by the notice of privacy rights, shall first be served on the individual whose records are sought by the subpoena. The notice of privacy rights must be personally served or acknowledged in writing by the individual upon whom the notice was served. A proof of service, or a written acknowledgment of receipt, shall be filed with the commission. The recipient of a notice of privacy rights*

has seven days to file an objection. If no objection is filed by the individual within seven days, the subpoena may be served on the nonparty custodian of the individual's records.

(5) Documents shall be produced within 15 days of service of the subpoena, unless an objection has been filed with the commission. If an objection is filed, no documents that are the subject of the objection shall be produced in response to a subpoena until the objection has been considered by the chairperson of the commission or an appropriate designee has considered the objection and ordered the documents to be produced. Unless otherwise directed by the commission, copies of any documents produced in response to a subpoena issued pursuant to this rule shall be provided to the opposing party within seven days of the party's receipt of the documents.

(6) Any motions under this subdivision shall be presented to the chairperson. The commission may designate the commission or the special masters to perform all or any part of the chairperson's duties under this subdivision.

(h) (Failure to comply with discovery request) If any party fails to comply with a discovery request as authorized by these procedures, the items withheld shall be suppressed or, if the items have been admitted into evidence, shall be stricken from the record. If testimony is elicited during direct examination and the side eliciting the testimony withheld any statement of the testifying witness in violation of these discovery procedures, the testimony shall be ordered stricken from the record. Upon a showing of good cause for failure to comply with a discovery request, the commission, master, or masters may admit the items withheld or direct examination testimony of a witness whose statement was withheld upon condition that the side against whom the evidence is sought to be admitted is granted a reasonable continuance to prepare against the evidence, or may order the items or testimony suppressed or stricken from the record. The

commission may, upon review of any hearing, order any evidence stricken from the record for violation of a valid discovery request if the evidence could have been ordered stricken by the masters for violation of a valid discovery request.

(i) (Applicable privileges) Nothing in these procedures shall authorize the discovery of any writing or thing which is privileged from disclosure by law or is otherwise protected or made confidential as the work product of the attorney, including memoranda by commission staff and examiners. Statements of any witness interviewed by the examiner, by any investigators for either side, by the judge, or by the judge's attorney shall not be protected as work product.

(j) (Definition of statement) For purposes of these procedures, "statement" shall mean either (1) a written statement prepared by or at the direction of the declarant or signed by the declarant, or (2) an oral statement of the declarant which has been recorded stenographically, mechanically, or electronically, or which has been videotaped, transcribed, or summarized in writing.

(k) (Return of discovery, continued confidentiality of discovery) Upon the completion or termination of commission proceedings, the respondent judge shall return to the commission all materials provided to the judge under this rule that have not become part of the public record. All items provided in discovery pursuant to this rule remain confidential under rule 102 until and unless those items become part of the public record.

(l) (Protective orders) The commission or the masters may, upon application supported by a showing of good cause, issue protective orders to the extent necessary to maintain in effect such privileges and other protections as are otherwise provided by law.

AMENDMENTS TO RULE 126

Rule 126. Procedural Rights of Judge in Formal Proceedings

(a) (Enumeration of rights, subpoenas) When formal proceedings have been instituted, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. The judge shall ~~also~~ have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter. *The judge shall also have the right to the issuance of subpoenas for the production of documents, as set forth in rule 122.* Subpoenas are to be issued by the chairperson of the commission, the chairperson's designee, or the special masters. Subpoenas addressed to the commission or its staff may only be obtained from the special masters upon a showing of good cause with notice to the commission.

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AMENDMENTS TO RULE 128

Rule 128. Amendments to Notice or Answer; Dismissals

(a) (Amendments) ~~The masters commission, at any time prior to the conclusion of the hearing, or the commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. During the evidentiary hearing, the special masters may allow amendments to the notice. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. If a motion to amend the notice to set forth additional facts not presented at the hearing is made during the evidentiary hearing, the chairperson of the commission, or the chairperson's designee, shall determine whether the motion shall be determined by the full commission or the special~~

masters. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his or her defense against the matters charged thereby.

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